SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

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# No. 559

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L. R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, AND SEABOARD AIR LINE RAILWAY COMPANY,

*Petitioners,*

vs.

JOHN GRANT LAUGHTER.

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## BRIEF FOR PETITIONERS.

### Official Report.

The decision of the Supreme Court of North Carolina is officially reported in 219 N. C., at page 689, 14 S. E. (2d), at page 826.

### Statement of Grounds of Jurisdiction.

The date of the judgment sought to be reviewed herein is May 31, 1941. The opinion upon which it is based was filed on the same date (R. 109, 121).

This action was tried and determined by the State courts under the Federal Employers' Liability Act of 1908.

The question presented arises under the Federal Employers' Liability Act and its determination requires the

construction and application of that Act (45 U. S. C. A., section 51-59).

*Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410;

*Minneapolis, St. P. & S. S. M. R. Co.* v. *Borum*, 286 U. S. 447.

In the opinion of the Supreme Court of North Carolina it is said:

> "All parties to this action concede that plaintiff must recover, if at all, under the provisions of the Federal Employers' Liability Act (45 U. S. C. A., sections 51-59) as interpreted by the Supreme Court of the United States. This was the theory of the trial in the Superior Court" (R. 113).

## Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari and need not be repeated at this time. Any necessary elaboration of the evidence will be made in the course of the argument.

## Specification of Errors.

The errors of which petitioners complain relate to the single question as to the correctness of the decision of the Supreme Court of North Carolina that plaintiff was entitled to recover as an employee within the provisions of the Federal Employers' Liability Act where it appeared that the receivers of the railroad company had a rule prohibiting the employment of a minor in train service, with which plaintiff was familiar and that plaintiff, who at the time of his employment and at the time of his injury, while engaged in train service, was under twenty-one years of age, secured his employment in such train service by fraud in that at the time of his application for employment he

stated on his honor that he was over twenty-one years of age and gave a false birth date, which showed his age to be over twenty-one years, when he would not have been employed if he had disclosed the fact of his minority.

This main question was presented to the Supreme Court of North Carolina on the following assignments of error:

1. Did the trial court err in refusing to grant defendants' motion for judgment on the pleadings? (Exception No. 5, R. 20; Assignment of Error No. 5, R. 96).

2. Did the trial court err in refusing to grant defendants' motions for judgment of nonsuit at the conclusion of plaintiff's evidence and at the conclusion of all the evidence? (Exception No. 15, R. 33; Assignment of Error No. 15, R. 98; Exception No. 21, R. 59, Assignment of Error No. 21, R. 99).

3. Did the trial court err in instructing the jury "as a matter of law that in the opinion of the Court the plaintiff, on August 26, 1937, was an employee of the defendants engaged in interstate commerce, and as such employee had the legal right to institute this suit under the provisions of the Federal Employers' Liability Act?" (Exception No. 23, R. 64, Assignment of Error No. 23, R. 100).

## ARGUMENT.

It is settled by decisions of this Court that the right to recover in an action based upon the Federal Employers' Liability Act, under which this action was tried (Complaint, R. 2; Answer, R. 7; Issues, R. 14), must be determined by the language of the act as interpreted by this Court.

*Toledo, etc., R. Co.* v. *Allen*, 276 U. S. 165;
*Southern R. Co.* v. *Gray*, 241 U. S. 333;
*Seaboard Air Line Ry. Co.* v. *Horton*, 233 U. S. 492;
*N. O. & N. E. R. Co.* v. *Harris*, 246 U. S. 367.

In *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410, it is held:

> "Where railroad employee obtained position by means of deception and fraud in procuring another to impersonate him and submit to physical examination, after he had previously been rejected because of his physical condition, he was without right to recover under the Federal Employers' Liability Act for injury, regardless of whether his physical condition contributed thereto."

In denying the right of Rock to recover for his injuries, the late Justice Butler says:

> "The carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. The enforcement of the act is calculated to stimulate them to proper performance of that duty. Petitioner had a right to require applicants for work on its railroad to pass appropriate physical examinations. Respondent's physical condition was an adequate cause for the rejection of his application. The deception by which he subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest, because calculated to embarrass and hinder the carrier in the performance of its duties and to defeat important purposes sought to be advanced by the act.
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> "The evils and disadvantages likely to flow from such impostures are the same in kind as those which invalidate attempts of common carriers by contract stipulations to escape liability for their own negligence in respect of duties essential to their public calling. In *N. Y. C. R. Co.* v. *Lockwood*, 17 Wall. 357, 21 L. Ed. 627, an action to recover damages by one injured while being transported on a railroad train in pursuance of

an agreement purporting to exempt the carrier from responsibility for the negligence of itself or its employees, the Court said (page 377): 'In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties —an object essential to the welfare of every civilized community. * * * It is obvious * * * that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment.'

"Respondent's position as employee is essential to his right to recover under the act. He in fact performed the work of a switchman for petitioner, but he was not of right its employee, within the meaning of the act. He obtained and held his place through fraudulent means. While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and physical condition to petitioner. His failure so to do was a continuing wrong in the nature of a cheat. The misrepresentation and injury may not be regarded as unrelated contemporary facts. As a result of his concealment his status was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and its other employees. Right to recover may not justly or reasonably be rested on a foundation so abhorrent to public policy. *N. Y. C. R. Co.* v. *Lockwood*, supra; *Great Northern Ry. Co.* v. *Wiles*, 240 U. S. 444, 448, 36 S. Ct. 406, 60 L. Ed. 732; *Stafford* v. *Baltimore & Ohio R. R. Co.* (D. C.), 262 F. 807."

The principle of the *Rock* case was approved by this Court in *Minneapolis, St. P. & S. S. M. R. Co.* v. *Borum*, 286 U. S. 447, in which the two cases are distinguished.

The *Borum* case presented the question as to whether a switchman, 49 years old, who falsely represented himself to be 38 years old in his application for employment when

he understood that the railroad company had a rule against accepting men over 45 to work in train service, was an employee. It was held under the peculiar facts of the case that he was an employee and entitled to the amount awarded him by arbitrators for injuries caused by the railroad company's negligence.

In the course of the opinion, which was also written by Mr. Justice Butler, it is said:

> "When plaintiff made his application he was 49 years old and understood that defendant had a rule against accepting men over 45 to work in its train service. He falsely stated in his application that he was 38 years old, and, when submitting to a physical examination required of applicants for employment, he again so misrepresented his age. This statement was relied upon by the examining surgeon and was in part the basis of his finding and report that plaintiff was in good health and acceptable physical condition. It was a general practice of men, over the age specified in the rule, when applying for such work on the railroads of defendant and other carriers in the Northwest, falsely to represent their ages to be within the specified limit, and that practice was known to the defendant. The arbitrators were unable to find whether defendant knew plaintiff was over 45 years. They did not find, nor does the evidence require a finding, that defendant was deceived by plaintiff's false statements, or that it accepted his application because of or in reliance upon them. The application was not rejected within 30 days, and, under rule 22, must be deemed to have been finally accepted. Under the terms of the contract of hiring, defendant did not without more have the right to remove plaintiff from its service on account of such misrepresentation. Plaintiff worked for defendant as a switchman for about seven years and when injured was well under the age for retirement. His work was satisfactory. Neither his age nor his physical condition contributed to cause his injury."

After quoting from the *Rock* case, Mr. Justice Butler goes on to say:

> *"Here, defendant could not have regarded the difference between plaintiff's actual age and that stated in his application as having any material bearing upon the physical condition it required.* The arbitrators did not find, and the evidence does not show, that plaintiff's false statement of his age substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition, or that, if he had given his real age, the surgeon would have found otherwise. *Indeed the surgeon's testimony shows that, save in exceptional cases, defendant, in accordance with its established rules, permits its switchmen to continue in the service until they are 65 years old without any physical examination after they are employed. Plaintiff's physical condition was not shown to be such as to make his employment inconsistent with the defendant's proper policy or its reasonable rules to insure discharge of its duty to select fit employees.* The evidence indicates that, under its own interpretation of rule 22 together with the schedule constituting the agreement between defendant and its switchmen, defendant, after the final acceptance of plaintiff's application, was not free to discharge him on account of the false statements as to his age.
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> "It is clear that the facts found, when taken in connection with those shown by uncontradicted evidence, are not sufficient to bring this case within the rule applied in *Minneapolis, etc., R. Co.* v. *Rock, supra,* or the reasons upon which that decision rests." (Italics added.)

Defendants' printed rules, a copy of which was in plaintiff's possession, contained a rule, No. 705, which provided that "Minors must not be employed in train service" (R. 56). The purpose of this rule is clearly the protection of, first, the minor himself, who should not be exposed to the dangers of train, engine or yard service; second, the public,

whose persons and property should not be exposed to the dangers created by the employment of minors in such service; and, third, the other employees of the railroad, who should have the assurance that they will be protected from the thoughtlessness and carelessness of immature co-employees.

Plaintiff, quite frankly, admits that he stated to the trainmaster of defendants, to whom he made application for employment, that he was 21 years old, when he was only 19; that he put a false birth date in his written application, so that it would show him to be over 21 years of age; that he stated on his honor that his answers to the questions were correct; that he knew he "was supposed to be twenty-one" in order to obtain employment; that he knew this to be a rule of the railroad company and that he gave a false birth date in his application in order to obtain employment (R. 26, 27). Plaintiff was asked: "In order that you might get a position in train service you falsified the date of your birth in your application for employment? A. Yes. Q. And on the basis of your falsification you were put in train service? A. Practically right away, yes." (R. 27).

On redirect examination (R. 31), plaintiff testified:

"Q. Counsel have asked you how you procured work, and the statement you made in respect to it; why did you make the statement to procure employment? A. I wanted to get a job with the Seaboard. Q. Why did you make the statement that you made, which has been shown you here and which you say you signed? A. I wanted a job."

T. A. Norris, trainmaster, testified: "Q. Would you or would you not have placed him at work on the Seaboard Air Line Railway if he had told you the truth about his age? A. If he had been under 21 I would not have employed him. Q. Did you put him to work because he told you he was over 21 years of age? A. Yes, that was among other requirements that I felt he met" (R. 44).

This Court says that the Federal Employers' Liability Act "is intended to stimulate carriers to greater diligence for the safety of their employees and of the persons and property of their patrons," and in support of this statement *Minneapolis, etc., R. Co.* v. *Rock, supra,* is cited.

*Jamison et al.* v. *Encarnacion,* 281 U. S. 635.

The rule against the employment of minors in train, engine or yard service is entirely in keeping with the purpose of the Federal Act as stated by this Court and the facts in the instant case are illustrative of the importance of the rule as a safety measure. The plaintiff was found by the jury to be guilty of contributory negligence, which means that he not only failed to use the grab-iron, which had been placed on the end of the car in compliance with the Federal Safety Appliance Act, but thoughtlessly permitted his hand to be in a space of three inches between the neck of the drawhead and the car, which was the only place between the cars in which his hand could have been mashed.

*Testimony of Bryant, Conductor,* R. 35;
*Testimony of Hiers, Inspector,* R. 54;
*Photographs of cars,* R. 57;
*Federal Safety Appliance Act,* U. S. Code, Annotated, Title 45, Sec. 4;
*Boehmer* v. *Pennsylvania R. Co.,* 252 U. S. 496.

Plaintiff testified that he did not look to see whether there was a hand-hold on the end of the car; that he made no effort to put his hand on a hand-hold; that he did not try to find one (R. 30). He testified that he braced himself on the other car (R. 21). The evidence shows that on the end of the car against which plaintiff says he braced himself a hand-hold had been placed, in compliance with the Federal Safety Appliance Act, for the use of plaintiff while working between the cars.

It is generally recognized that a minor cannot be expected to exercise the same degree of care as an adult and that it is the duty of one employing a minor to give him special instructions as to the dangers of his employment.

It is fortunate that plaintiff's negligence did not occur at a time when it would have resulted in injury to his fellow employees, or injury to the person and property of the railroad company's patrons.

In *Holt* v. *Manufacturing Co.*, 177 N. C. 170, 98 S. E. 369, a boy 17 years old was injured while engaged in the operation of a rip-saw. In defining the defendant's duty to plaintiff, Walker, J., says:

> "The law puts upon a master, when he takes an infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business and of instructing him how to avoid them. Nor is that all: the master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance and inexperience of the servant as to make him fully aware of the danger to him and to place him, with reference to it, in substantially the same state as an adult."

It is also said in this case: "Children, wherever they go, must be expected to act upon childish instincts and impulses—a fact which all persons who are *sui juris* must consider and take precautions accordingly."

*Bellamy, Admr.* v. *Lumber Co.*, 183 N. C. 433, 111 S. E. 773;

*Ensley* v. *Lumber Co.*, 165 N. C. 687, 81 S. E. 1010.

While it may not be important in the determination of this case, it is significant that the plaintiff was not only a minor at the time of his alleged employment, but that his minority continued up to and more than a year beyond the time of his injury. He was born December 13, 1917, and was injured

August 26, 1937. At the time of his injury he was less than twenty years of age.

Some years before the decision of this Court in the *Rock* case, *supra*, the Supreme Court of Appeals of Virginia held:

> "Where a minor by knowingly misrepresenting his age is accepted by a railroad as a student fireman, though the rules of the company prohibit the accepting of minors for train service, he is a *trespasser*, or at most a bare licensee, and not a servant, and the railroad is not liable for his death in a collision, since it would be liable only for injuries willfully or wantonly inflicted upon him."
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> *Norfolk & Western Ry. Co.* v. *Bondurant's Admr.*, 109 Va. 515, 59 S. E. 1008.

The question of plaintiff's status as an employee raised by motions for judgment of nonsuit is also raised by motion for judgment on the pleadings (Exception No. 5, R. 20), and by exception to the court's charge to the jury that plaintiff was, as a matter of law, an employee of defendants at the time of his injury (Exception No. 23, R. 65).

An examination of the cases cited in the opinion of the Supreme Court of North Carolina will show that in none of them was the right of a minor to recover damages for injuries in train service involved, nor did it appear in any of them that employment had been obtained by fraud in misrepresentation as to age. None of the cases cited which involve the right of a minor to recover arose under the Federal Employers' Liability Act. The case of *Dawson* v. *Texas & P. Ry. Co.*, 123 Texas 191, 70 S. W. (2d) 392, cited by the Supreme Court of North Carolina, in which petition for writ of certiorari was denied by this Court (293 U. S. 580), bears no similarity to the present case. In that case a switchman made a false statement as to previous injury while employed by another railroad company. In *Texas & N. O. R. Co.* v. *Webster*, 123 Texas 197, 70 S. W. (2d) 394,

also cited by the Supreme Court of North Carolina, in which petition for certiorari was denied by this Court, plaintiff withheld information that he had employed attorneys to sue and had filed suit against a former railroad employer. This case is also clearly distinguishable from the *Rock* case and from the case at bar. The substance of the false statements made in the foregoing cases bears no relation to the safety of fellow employees and the travelling public, or to the protection of the employer's property and that of others in the employer's charge, and obviously the misstatements of the employees in no way affected the public policy referred to by this Court in *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410.

We submit in conclusion that there is the same compelling reason for the reversal of the decision in the present case that existed in the *Rock* case, and we ask that our petition for writ of certiorari be granted.

Respectfully submitted,

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*Attorney for Petitioners.*